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THE PRESIDENT'S AUTHORITY TO PROMULGATE DEATH PENALTY STANDARDS

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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THE PRESIDENT'S AUTHORITY TO PROMULGATE DEATH PENALTY STANDARDS

by Captain Annamary Sullivan

ABSTRACT: This thesis examines the authority of the President to promulgate the death penalty standards contained in Rule for Courts-Martial 1004 of the Manual for Courts-Martial, United States, 1984. The Presidential promulgation of this rule involves serious separation of powers issues with respect to his power to determine the circumstances which warrant capital punishment, to establish substantive law for the military justice system, and to make rules for the armed forces in his capacity as Commander-in-Chief. This thesis concludes that, in light of Congressional delegation of authority to the President, his issuance of the death penalty standards was proper.

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I. INTRODUCTION

The Court of Military Appeals in United States v. Matthews[1] held that the system for assessing capital punishment in the military was defective since the sentencing procedures failed to require specific findings as to individualized aggravating circumstances. The court indicated that either Congress or the President in the exercise of his responsibilities as commander-in-chief and of the powers delegated to him by Congress[2] could take corrective action. The President, not Congress, acted to correct the defective sentencing procedures in promulgating Rule for Courts-Martial 1004.[3] This thesis will explore the authority of the President to promulgate death penalty sentencing procedures. The areas to be explored will be those relied upon by the Court of Military Appeals in Matthews: delegation by Congress under Article 56,[4] Article 36,[5] UCMJ, and the President's power as Commander-in-Chief of the military forces.[6]

II. BACKGROUND

A. Supreme Court Precedents

In 1972, the Supreme Court in Furman v. Georgia[7] invalidated the capital punishment statutes of Georgia and Florida. Although the Court was unable to muster a majority or even a plurality opinion,[8] it nevertheless established one basic ground rule: no capital punishment can be adjudged in a system which leaves the decision to the unguided discretion of the jury. As the Court subsequently explained, its holding in Furman was that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[9] "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited. . . ."[10] The sentencing authority must be given relevant information and standards with which to guide the use of that information.[11] Several years later, in a flurry of decisions addressing the validity of statutes enacted in response to the Furman ruling, the Supreme Court elaborated on the constitutional requirements for capital punishment.

The Court upheld three different capital sentencing schemes in Gregg v. Georgia,[12] Proffitt v. Florida,[13] and Jurek v. Texas.[14] All three systems provided for a bifurcated trial, that is, a sentencing proceeding separate from the guilt phase of trial. They also included provision for judicial review by either the state supreme court or a court with statewide jurisdiction. The bifurcated procedure solved the

evidentiary dilemma that existed when "information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."[15] The appellate review provision assured that the death penalty would not be imposed "on a capriciously selected group of convicted defendants."[16]

Each state dealt in a different way with the requirement that the sentencing authority be given standards to apply in making a decision on capital punishment. The Georgia statute considered in Gregg listed ten aggravating circumstances, at least one of which had to be found beyond a reasonable doubt before the death penalty could be adjudged; nonstatutory aggravating and mitigating circumstances had to be considered; and the jury determination on sentence was final.[17]

The Florida statute reviewed in Proffitt listed specific aggravating and mitigating circumstances and the jury was directed to consider whether sufficient mitigating circumstances existed to outweigh the existing aggravating circumstances.[18] The jury's verdict was advisory only, but the standard for the sentencing judge to order death after a jury advised life was that the facts should be so clear and convincing that "virtually no reasonable person could differ."[19]

Finally, the Texas statute in Jurek, which did not list aggravating factors, limited capital murder to five narrow categories[20] and required the jury, in the

sentencing proceeding, to answer three questions, including one on the future dangerousness of the defendant.[21] Only if all three questions were answered affirmatively could the death sentence be imposed.[22] The Court determined that the Texas action in narrowing the categories of capital murder served "much the same purpose" as statutory aggravating circumstances.[23]

Thus all three statutes required "the sentencing authority to focus on the particularized nature of the crime."[24] Further, Florida and Georgia expressly provided for the consideration of mitigating circumstances. Similarly, in answering the question on future dangerousness in the sentencing stage, the Texas jury "may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it."[25] Thus, since all three "capital-sentencing procedure[s] guide[] and focus[] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death,"[26] all three were found constitutionally sufficient.

The Court, at the same time that it found the capital punishment statutes of Georgia, Florida, and Texas constitutional, struck down other statutory schemes in Woodson v. North Carolina[27] and Roberts v. Louisiana.[28] These two statutes mandated the death penalty for specified offenses. Lockett v. Ohio[29] made explicit the message that mitigating evidence must be a factor in the death penalty decision: the Constitution requires that "the sentencer, in all but the rarest

kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[30]

B. Military Precedent

In early 1979, Private First Class Wyatt L. Matthews brutally raped and murdered Phyllis Villanueva, an Army librarian in Germany.[31] He was charged with these offenses and convicted of them by a court-martial which, by unanimous vote, sentenced him to death.[32] On appeal he attacked the constitutionality of the military's capital punishment provisions.[33] The Court of Military Appeals determined that there was no military necessity for distinguishing between the murder and rape committed by Matthews and similar crimes tried in civilian courts: "we see no reason why Matthews should be executed for his murder and rape of Mrs. Villanueva if the sentencing procedures used by the court-martial failed to meet the standards established by the Supreme Court for sentencing in capital cases in civilian courts."[34] Accordingly, the court ruled that civilian precedent did apply to military capital sentencing.

Reviewing Supreme Court precedents, including those cases discussed supra, Matthews found that certain common features appeared in a constitutionally valid death penalty procedure: a bifurcated sentencing proceeding, specific aggravating circumstances iden-

tified to the sentencer, selection of and findings on the particular aggravating circumstances used by the sentencer to impose the death penalty, unrestricted opportunity for the defendant to present mitigating and extenuating evidence, and mandatory appellate review of the appropriateness of the sentence.[35]

The court then applied these principles to the military justice system. First, a bifurcated sentencing procedure is followed.[36] Second, "[c]ertain aggravating circumstances, such as premeditation, specific intent, and murder during commission of specified felonies, must be found by the court members . . . . These findings identify the instances in which an accused is eligible for the death penalty. After the findings, evidence may be submitted to identify other aggravating circumstances. . . ."[37] Third, the defendant has an unlimited opportunity to put on evidence in extenuation and mitigation.[38] Next, there is mandatory review of the facts, law, and sentence appropriateness in a comparative sense, both throughout the jurisdiction by the convening authority and throughout defendant's branch of service by the service Court of Military Review. Thereafter, the Court of Military Appeals must review cases as to questions of law while the President, who can take any lesser action on the sentence, must ultimately approve any death sentence.[39]

Based upon this analysis, the court held that most of the safeguards required by the Supreme Court were already in place in the military justice system.

However, since court-martial members were not required to identify specifically the aggravating factors relied upon in assessing the death sentence, it was impossible for the appellate courts to determine whether they had made the necessary individualized sentencing determination based on the character of the defendant and the circumstances of the crime.[40] Additionally, the court rejected the government argument that a finding of premeditation narrowed the class of death-eligible offenses sufficiently to meet constitutional requirements, noting that the military premeditated murder scheme paralleled statutes struck down on constitutional grounds.[41] In summary, the Court of Military Appeals "held that the sentencing procedure in [Matthews'] case was defective because of the failure to require that the court members make specific findings as to individualized aggravating circumstances---findings which can, in turn, be reviewed factually and legally."[42]

The court noted that Congress "obviously" intended that in cases of premeditated murder, certain types of felony murder, and rape, the death sentence should be available and indicated that the necessary changes to the court-martial sentencing procedures could be provided by the President:

> Congress can take action to remedy this defect that now exists in the sentencing procedure employed by courts-martial in capital cases. However, corrective action also can be taken by the President in the exercise of his responsibilities as commander-in-chief under Article II, Section 2, and of powers

expressly delegated to him by Congress. See Article 36, UCMJ, 10 U.S.C. Section 836.

> The congressional delegation of powers to the President has traditionally been quite broad in the field of military justice. Pursuant to Article 36 of the Uniform Code, the President promulgates rules to govern pretrial, trial, and post-trial procedures of courts-martial. Unlike other Federal criminal statutes, the punitive articles of the Uniform Code for the most part authorize punishment "as a court-martial may direct"; no maximum or minimum sentence is specified. However, as contemplated by Article 56 of the Uniform Code, 10 U.S.C. Section 856, the President prescribes maximum punishments for the various offenses. . . .
>
> The great breadth of the delegation of power to the President by Congress with respect to court-martial procedures and sentences grants him the authority to remedy the present defect in the court-martial sentencing procedure for capital cases.[43]

C. The Solution

Rule for Courts-Martial 1004, which had been circulated for public comment even prior to the Matthews decision,[44] attempted to rectify the deficiency by enumerating specific aggravating factors, at least one of which the court members must find in order to impose the death penalty. The Rule also provides that the members must find that the aggravating circumstances outweigh the extenuating or mitigating circumstances before a death sentence can be adjudged. The President caused the 1984 Manual for Courts-Martial and its Rules

for Courts-Martial to be issued "[b]y virtue of the authority vested in me as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code (Uniform Code of Military Justice). . . ."[45] The issue is whether, in light of the unique nature of the death penalty, he had the authority to promulgate the capital punishment provisions of R.C.M. 1004. An analysis of the issue entails review of the powers granted to the President by Congress and his power as Commander-in-Chief of the armed forces.

III. CONGRESSIONAL DELEGATION: Article 56

A. Introduction

The first asserted basis for the President's promulgation of death penalty standards is the power granted him by Congress under Article 56, UCMJ, to prescribe maximum punishments.[46] The analysis is this: Congress has prescribed which offenses merit the death penalty[47] but has otherwise authorized the Executive to set maximum punishments; the President has established lesser degrees within the capital offense categories and limited the punishment on those offenses to non-capital punishment.[48] To determine whether this is a valid analysis requires a review of the sentencing concerns in capital cases as well as a review of the limits on Congressional delegation of authority.

B. Delegation of Congressional Power

The question of the power of Congress to delegate its authority to another branch of government has been a thorny one in the history of the U.S. Constitution. The Constitution prescribes that there shall be three separate but coequal branches of government: the legislative, the executive, and the judicial.[49] "[T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."[50] By dividing the federal government into three branches, the framers of the Constitution sought to ensure that each branch would limit itself to its assigned area of responsibility.[51] The question is, to what extent can Congress defer arguably legislative judgments to the Executive?

The Supreme Court has often considered the extent to which Congress can delegate its powers but has failed to establish a bright-line:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[52]

Historically, the judiciary has been deferential to delegations by Congress to the President. For example, in The Brig Aurora,[53] the act of Congress which provided for revival of legislation by Presidential proclamation was upheld. Similarly, it was constitutional for Congress to provide for "the suspension of an act upon a contingency to be ascertained by the

President, and made known by his proclamation."[54] The test eventually applied was an "intelligible principle" standard: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[55]

The most heightened concern over the delegation of power to the Executive by Congress was expressed by the Supreme Court during the 1930s when a conservative Court was faced with an active, interventionist president and a Congress willing to delegate much authority to him in order to effectively deal with the problems of the Great Depression. In two cases, the Supreme Court struck down New Deal legislation in which Congress had granted the President broad powers.

The first legislation subjected to the Court's displeasure was the National Industrial Recovery Act.[56] Portions of the Act authorized the President to prescribe rules and regulations to control the transportation of petroleum and to issue a code of fair competition. The President exercised these powers, which were then challenged as unconstitutional delegations of legislative power.

The plaintiffs in Panama Refining Co. v. Ryan[57] challenged the power of the President to prescribe rules and regulations relating to the transportation and distribution of petroleum. The Supreme Court reviewed the challenged provision that "purport[ed] to authorize the President to pass a prohibitory law"[58] on

the transportation of excess petroleum and petroleum products.

> The question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.[59]

Applying these criteria, the Court found the challenged section wanting: among its other failures, it failed to set forth criteria to guide the President's course of action, did not require any finding by the President as a condition of his action, and, in sum, failed to declare Congressional policy on the transportation of excess petroleum.[60] "So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[61]

Examining the other sections of the Act for a declaration of policy or a standard of action which would limit or guide the President's action, the Court found none.[62] While the Act did contain a "general outline of policy," the Court determined that it did not limit or control the broad grant of authority to the executive: "The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a legislature rather

than those of an executive or administrative officer executing a declared legislative policy."[63]

The Court recognized that Congress can constitutionally confer upon officers of the executive branch the power to make regulations for the administration of laws, regulations which are binding rules "when found to be within the framework of the policy which the legislature has sufficiently defined."[64] The Court also recognized that delegations had generally been upheld but found that "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend" and declared that the challenged provision exceeded the constitutional limits.[65]

In its second New Deal confrontation, the Supreme Court in A.L.A. Schechter Poultry Corp. v. United States[66] reviewed a "Live Poultry Code" promulgated by the President as a code of fair competition. The Code contained specific regulations over the poultry industry, including pay rates, hours in a work week, minimum age, minimum number of employees fixed by volume of sales, and prohibited trade practices.[67] The Court focused first on the unfair trade practices provision which authorized the President to approve a code, that is, a standard of fair practice, a violation of which was criminally punishable.

Concerned with the open-ended nature of a "code of fair competition," the Court looked to whether the President's discretion was limited. "[T]he purpose is

clearly disclosed to authorize new and controlling prohibitions through codes of laws which . . . the President would approve or prescribe . . . as wise and beneficent measures for the government of trades and industries, according to the general declaration of policy in section one."[68] The Court, stating that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry," examined the Act to find the limits to the President's discretion.[69] Finding few restrictions of any consequence, the Court determined that "the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."[70]

Outraged over the Supreme Court's evisceration of his New Deal, President Roosevelt proposed his notorious court-packing scheme. He lost that battle but arguably won the war when, thereafter, in Yakus v. United States,[71] the Supreme Court upheld the Emergency Price Control Act.[72] The Price Control Act provided for a presidentially-appointed Price Administrator with the authority to fix fair commodity prices in order to prevent wartime speculation and profiteering.[73] The Court found the delegation of authority to be constitutional: "Congress enacted the Emergency Price Control

Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute."[74]

In fact, the "standards" found to be adequate were quite broad: the prices should effectuate the policies of the Act, should be "fair and equitable," and the Administrator should give "due consideration" to prevailing prices.[75] Unmistakably, the Court had returned to a more relaxed approach to delegations by Congress to the Executive.

A fair reading of the case law thus suggests that the standard for review of delegation issues is a generous one: "Congress has stated the legislative objective, has prescribed the method of achieving that objective. . ., and has laid down standards to guide the administrative determination. . . ."[76] In the post-New Deal era, so long as congressional delegations include intelligible standards and statements of purpose, they will pass constitutional muster.[77]

C. Delegating Sentencing Authority

What, however, if the subject matter of the delegation is the power to set sentences? Recently courts, including the Supreme Court,[78] dealt with a spate of cases challenging the Congressional delegation of sentencing power under the Sentencing Reform Act[79] to the U.S. Sentencing Commission. The Act established

the Sentencing Commission as an independent department in the judiciary with seven members, three of whom must be federal judges, appointed and subject to removal by the President.[80] The Commission was empowered to establish sentencing "guidelines" which are, in fact, restrictions on the range of punishments that judges can assess.[81]

The district courts wrestled with a variety of challenges to the Commission and its guidelines and most of the challenges provide no guidance on the issue of Congressional delegation to the Executive of the power to determine punishment for federal crime.[82] One argument advanced, the argument that Congress improperly delegated its legislative power to the judiciary, does, however, cast an interesting light on the argument over Article 56, UCMJ, and the extent to which Congress may delegate to the President the power to establish maximum punishments.

There is authority for the proposition that the establishment of penalties is a legislative function that cannot be delegated. "[W]ithin our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress."[83] Indeed, at least one court suggested that Congress, in establishing the Sentencing Commission, improperly attempted to give away its legislative responsibilities. "Simply said, Congress can [not] appoint an unelected commission to initiate, write and

thereafter monitor the sentencing laws of this nation . . . ."[84] Congress should not be permitted "to confer power which is 'legislative' in character to agencies or commissions."[85] Nevertheless, in spite of this concern that Congress was attempting to evade difficult legislative decisions, courts generally determined that, under the "intelligible principle" standard, the Sentencing Reform Act did not constitute an unconstitutional delegation by Congress.[86]

Reviewing and applying precedent on excessive delegation, the district courts found that the Sentencing Reform Act

> contains clear directives and standards for the Commission to follow. The Commission is directed to punish in accordance with recognized tenets of criminal law, eliminate sentencing disparities and maintain judicial discretion. Congress further instructed the Commission to categorize the offenses and avoid discrimination on any basis. Our review of the Act compels us to conclude that Congress established adequate standards and intelligible principles for the Commission to follow and we hold that Panama Refining and Schechter Poultry are not controlling.[87]

The Supreme Court agreed with this analysis by the district courts and upheld the constitutionality of the commission and its guidelines.[88] The Court reasoned that the "nondelegation doctrine. . .do[es] not prevent Congress from obtaining the assistance of its coordinate Branches. . . . 'In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent neces-

sities of the government co-ordination.'"[89] The "intelligible principle" test has been applied with the recognition that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[90]

The Supreme Court reviewed the history of its precedent on Congressional delegation of authority and recognized that, apart from the two New Deal cases,[91] it has uniformly upheld Congressional authority to delegate power under broad guidelines.[92] A delegation is constitutionally sound if "Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[93] Applying that test, in light of the detailed guidance provided by Congress to the Commission, the Court had no doubt that the delegation was constitutionally sufficient.[94]

Thus the "intelligible principle" test applies to delegations of sentencing authority as well as to delegations of other authority. How, then, does the military sentencing scheme fare under such a test?

D. Military Sentencing

In reviewing the legislative delegation, it is important to recognize that Congress, in enacting the UCMJ, was not writing on a tabula rasa. Historically,

much latitude has been granted military courts in assessing punishment. Until late in the nineteenth century, there were no maximum limits on sentences by courts-martial.[95] In 1890, Congress provided that, whenever the sentence was left to the discretion of the court-martial by the Articles of War, "the punishment shall not, in time of peace, be in excess of a limit which the President may prescribe."[96] Thus there is a long history of delegation of authority to the President to determine the punishment for non-capital offenses. The Articles of War did, however, speak specifically to the death penalty: "No person shall be sentenced to suffer death, except by the concurrence of two-thirds of the members of a general court-martial, and in the cases herein expressly mentioned."[97] For some offenses, capital punishment was mandated; for others, it was authorized in the discretion of the court.[98]

In viewing the legislative history of Article 56, the principal concern of Congress appears to have been that the President not exceed the statutory maximum in establishing punishment.[99] The thrust of the discussion on Article 56 is that Congress, and not the President, determines which offenses are capital:

> Now, take a death case. In one or two instances it is mandatory. In several others it may be imposed or not. In all other cases it may not be imposed, even if the President says he would like to have it imposed. . . . Because it has not been specified, he could not provide for it.[100]

As the House Report noted, "the death penalty can be adjudged only when specifically authorized for the violation of a specific punitive article."[101]

Article 18 of the Code deals with jurisdiction and includes the provision that general courts-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter."[102] The language "including the penalty of death when specifically authorized by this code" were offered as a clarifying amendment to Article 18: "[n]ow we provide under certain punitive articles that the penalty of death may be imposed. Unless it is so provided of course it cannot be imposed."[103]

Thus Congress established at least one clear limit on the President's power to affix punishments. Article 55 contains another limitation and standard for punishment: it prohibits "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment. . . ."[104] Also prohibited is the use of irons, except for safe custody purposes.[105]

> As we come to the punitive articles, starting with 77, you will see each one specifically says that the person found guilty can be sentenced as the court martial may direct. In a certain few a death penalty is provided on a mandatory basis, and in a certain additional number there is the death penalty or such other sentence. Except where it is spelled out that the death penalty can be imposed, it cannot be imposed. In no other case, the President to the contrary notwith-

> standing, can an offense draw a death penalty. Unless Congress provides it specifically in the article, no one else can provide it. . . . As to that, the President and everybody else is bound. He cannot raise any sentence to the death penalty, unless it is already provided in here. . . . Now, in setting maximum limits he can set whatever maximum limits, aside from the death penalty ---20 years, 10 years, 30 years, or whatever it may be---and the court martial may not exceed any of those maximums. However, there is no particular limit of the maximum except the death penalty.
>
> When I say no limit to the maximum, I am talking about confinement, as distinguished from the death penalty.
>
> The President cannot, in addition, prescribe any punishment which would be cruel or unusual or any punishment that would call for tattooing, marking, and others prohibited.[106]

Viewed as a whole, then, the Code has laid down adequate standards and intelligible principles for the delegation of sentencing authority to the President, particularly when viewed in the light of the historical role the President has always played in this area. "Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied. 'They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.'"[107] The issue then becomes whether capital punishment is of such a unique nature that it is insufficient for the legislature to indicate the offenses which carry that potential sentence: does the legislature alone have the power to distinguish between circumstances in which an

offense merits the death sentence and circumstances in which it does not?

E. Capital Sentencing

In Gregg v. Georgia, the Supreme Court expounded on the limited role of the courts in reviewing a statutory death penalty scheme. It is worth quoting at length to catch the full flavor of the Court's emphasis on the legislative nature of defining capital offenses.

> [W]hile we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators. "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. . . ." Dennis v. United States, 342 U.S. 494, 525 (1951)(Frankfurter, J., concurring in affirmance of judgment).
>
> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. . . .
>
> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, 408 U.S. at 383 (Burger, C.J., dissenting). The deference we owe to the decisions of the state legislatures under our federal system

> . . . is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." Gore v. United States, 357 U.S. 386, 393 (1958).[108]

Thus, with this emphasis on the importance of the legislature in the capital punishment scheme, the question becomes whether the narrowing of an unconstitutionally broad death penalty scheme can be accomplished by other than legislative action.

The Ninth Circuit faced the issue in United States v. Harper.[109] James Harper was charged with violations of the Espionage Act[110] by obtaining and selling national defense information to an officer of the Polish Intelligence Service.[111] The Espionage Act provided for the death penalty or for imprisonment for life or for any term of years; however, it contained no guidelines for the sentencing authority's discretion in determining whether to adjudge the death penalty.[112] The district court recognized the difficulty with the lack of guidelines in the Espionage Act but read the statute as delegating to the courts the authority to formulate the necessary guidelines at the sentencing stage of the trial.[113] On appeal, the Ninth Circuit determined that the district court clearly erred in its conclusion.[114]

The circuit court reviewed Gregg and found it "replete with references to the peculiarly legislative character of sentencing determinations, and the particularly limited role of judges in this area."[115] While deference must be granted the Congressional determination that the death penalty is appropriate for some acts of espionage, the principles enunciated in

Gregg are "germane to the question of where the required guidelines must come from."[116]

> If the "will and . . . moral values of the people" are particularly important in sentencing decisions, and if specification of punishments is therefore peculiarly a legislative function, then specifying the circumstances under which someone may be put to death must also be a function of the elected representatives of the people. . . . The Court has thus plainly required that guidelines be expressly articulated by the legislature in the statute authorizing the death penalty.[117]

The Harper court determined that "[t]he conclusion that the Constitution requires legislative guidelines in death penalty cases is thus inescapable."[118]

While the Harper court set forth a strict rule, other courts have developed a less rigid approach. One analysis looks beyond the statute to its legislative history to find necessary guidelines. Thus, for example, in Carlos v. Super. Court of Los Angeles County,[119] the California Supreme Court read an intent to kill requirement as an aggravating circumstance for a felony murder conviction, a reading that had some support in the statute's somewhat ambiguous legislative history.[120]

Another approach is for the courts to look to the state's criminal code in its entirety. In McKenzie v. Risley,[121] the petitioner cited Harper and argued that the death penalty statutes must contain the necessary procedural safeguards and statutory deficiencies cannot be cured by judicial construction.[122] The Ninth Circuit, in rejecting the argument, pointed out that,

unlike the court in Harper, the Montana Supreme Court did not create the guidelines ad hoc but instead looked to other statutes to provide the necessary guidelines.[123]

State supreme courts will narrowly interpret otherwise overly broad statutes. In State v. Bartholomew,[124] the Washington Supreme Court reviewed a statute which limited capital murders to those committed with premeditation. The statute had a broad provision for aggravating circumstances, which the court limited: "if the legislature fails to provide sufficient guidance in defining aggravating circumstances, then the state's supreme court in reviewing the death sentence must supply the omission with an acceptably narrow interpretation."[125] Indeed, the Supreme Court, in upholding the death penalty statute in Jurek,[126] relied in part on the narrow construction applied by the state appellate court.

F. Conclusion

Congress can delegate its power to set sentencing standards, so long as it provides "intelligible principles" for the establishment of punishments. It has generally done that through the interplay among Article 55, Article 56, and Article 18. As to capital sentencing, the degree to which the statute must within its four corners delineate the aggravating circumstances on which the death sentence may be based is open to debate. Clearly, as Harper indicates, the

sentencing body cannot set the standards and there should be some means of discerning the legislative intent as to the death penalty.

What makes the application of this analysis to the court-martial process interesting is that Congress has in fact not spoken on the subject of capital punishment in the military post-Furman. Indeed Congress appears to be avoiding speaking in this area, at least to the extent that its actions could be read to question the Manual's capital sentencing provisions.[127] Thus, there is no legislative history to review with respect to Congressional intent on aggravating circumstances, at least as directed to the necessary narrowing of a constitutionally overbroad class of death-eligible offenders. Were we dealing with purely a statutory federal crime, this silence would most likely be constitutionally fatal.

There is, however, another wild card in the analysis: the capital offenses are military. The President has historically had extensive power to delineate less-than-capital punishment and, in R.C.M. 1004, he has arguably done just that: by defining aggravating circumstances, he has removed from the category of capital offenders those who do not fit the standards. The President is thus acting in an area in which he has much authority and in which the executive and legislature have long worked cooperatively. While the concept of separation of powers is important, the Constitution does not "require[] that the three branches of the Government operate with absolute independence. . . .

[W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[128]

Further, Congress, in enacting the UCMJ, indicated those crimes for which it mandated the death penalty[129] and those crimes for which it merely authorized the death penalty. Certainly the argument can be made that the enactment of mandatory and discretionary capital sentences suggests that Congress wanted to deal fully with the death penalty issue, exclusive of Presidential action. What Congress actually did, however, was express its intention as to which offenses must receive the death sentence and which may receive the death sentence. It would be highly questionable at best if the President attempted to alter or limit a mandatory capital offense and he has not done so, even though some kind of action to save such an offense from being held unconstitutional appears to be necessary.[130] As to offenses for which the death penalty is discretionary, Congress has obviously left open the factors to be considered in making the sentencing decision and is apparently not distressed by the Manual's capital sentencing provisions.[131] Thus, for offenses which authorize but do not require the death sentence, Congress has neither expressly nor impliedly precluded Presidential action to narrow the category of death-eligible offenders.

> The essentials of the legislative function are the determination of the legislative

> policy and its formulation and promulgation as a defined and binding rule of conduct . . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from the relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.[132]

In providing the constitutionally required aggravating circumstances, the President has made effective the legislative decision that the death penalty be a potential punishment for certain offenses. This action is consistent with his duty to execute the law: "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of execution of the law."[133]

IV. CONGRESSIONAL DELEGATION: Article 36

A. Introduction

"Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating" that rule-making authority.[134] In Article 36, UCMJ, Congress empowered the President to establish procedures for courts-martial.[135] The purpose behind granting the President the power to promulgate procedures was to obtain a uniform system

for all courts-martial, irrespective of branch of service.[136] The President was to establish evidentiary rules which followed as nearly as possible the generally established rule of law, in order to assure standard protections to military accuseds.[137] In R.C.M. 1004, the President has set forth the procedures to be followed in capital sentencing proceedings. The question is, however, whether R.C.M. 1004 is truly procedural, in which case it is properly promulgated, or whether it is in fact substantive and thus beyond the President's rule-making power.

B. Substantive vs. Procedural

Whether sentencing criteria are substantive or procedural is an area in which the courts have been unable to draw a bright-line. As the Supreme Court has recently noted, the distinction can be elusive.[138] "The test must be whether a rule really regulates procedure,---the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[139]

The argument is made that R.C.M. 1004 is in fact substantive and not procedural. The theory is that, in R.C.M. 1004, the President has created a distinction between different types of crimes.[140] Authorization to prescribe rules of procedure gives "no authority to modify, abridge or enlarge the substantive rights of litigants. . . ."[141] "When a rule of law is one which

would affect a person's conduct prior to the onset of litigation and has no design to manage ongoing litigation, it is a rule of substance rather than procedure."[142]

Much of the useful discussion on what constitutes a procedural change arises in cases in which an ex post facto violation[143] is asserted. An ex post facto law is one "which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed."[144] The prohibition against ex post facto laws does not, however, apply to procedural changes,[145] hence the case discussions on what constitutes procedural change.

C. Sentencing Procedures in General

The Supreme Court recently looked to changes in sentencing procedures in Miller v. Florida.[146] In 1983, Florida replaced its system of indeterminate sentencing with a statutory plan for sentencing guidelines intended to assure some consistency in the sentencing process.[147] At the time Miller was convicted of his offenses, the sentencing guideline provided for a presumptive sentence of three and one-half to four and one-half years.[148] At the time he was sentenced, however, the sentencing guidelines had been revised and his presumptive sentence jumped to five and one-half to

seven years.[149] He was sentenced over his objection under the revised guidelines to seven years' confinement.[150]

In discussing Miller's challenge to his sentence, the Supreme Court recognized that "no ex post facto violation occurs if the change in the law is merely procedural and 'does not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish.'"[151]

> Although the distinction between substance and procedure might sometimes prove elusive, here the change at issue appears to have little about it that could be deemed procedural. The . . . increase in points for sexual offenses in no wise alters the method to be followed in determining the appropriate sentence; it simply inserts a larger number into the same equation. The comments of the Florida Supreme Court acknowledge that the sole reason for the increase was to punish sex offenders more heavily: the amendment was intended to, and did, increase the quantum of punishment. . . .[152]

While the Supreme Court in Miller refused to accept an analogy to federal parole guidelines, changes to which have withstood ex post facto challenge, the Court's reasons do not relate to the issue of the procedural/substantive dichotomy.[153] In fact, the discussion of the distinction between substantive and procedural matters provided by the federal courts in parole and bail cases is enlightening.

In a case dealing with bail, United States v. McCahill,[154] the Ninth Circuit described the substantive/procedural dichotomy as "an attempt to reconcile the necessity for continuous legislative refinement of

the criminal adjudication and corrections process with the constitutional requirement that substantial rights of a criminal defendant remain static from the time of the alleged criminal act."[155] Applying that distinction, the court found procedural a change in the standards for bail pending appeal.[156] Conversely, a change that eliminated the possibility of parole, probation, or suspension of sentence for a certain category of offenders did not "merely change the sentencing procedure, but alter[ed] the substantive sentence to be imposed."[157]

In United States v. Crozier,[158] the petitioner challenged the application of new forfeiture rules to her. Wolke, who was an indicted co-conspirator of Crozier but who was not indicted for engaging in a continuing criminal enterprise with him, was placed under a restraining order which prevented her from disposing of her personal property.[159] Under old forfeiture rules, before obtaining a restraining order, the government had to establish before trial the merits of its underlying case.[160] Under new rules, Wolke as a third party had to wait until after Crozier's trial was concluded before she could protect her property interests.[161] The Ninth Circuit determined that the new rules do not "change the fact of forfeiture as punishment but merely establish[] the procedure by which forfeiture will be carried out. Therefore, Wolke will not face any greater punishment as a result of the new law."[162]

Thus, where the fact and amount of punishment is already established, changes in how the actual punishment is assessed are procedural. Since the various articles of the UCMJ on the substantive offenses include delineation of those that carry the maximum sentence of death, R.C.M. 1004 thus would appear to be procedural. The issue then becomes, as it did when delegation of sentencing power was under review, whether the unique nature of the death penalty is such that this conclusion should not be drawn.

D. Capital Sentencing Procedures

Time and again in its death penalty cases, the Supreme Court has stressed the need for constitutionally adequate procedures.[163] As the Court summarized in California v. Ramos,[164] "[i]n ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors. . . ."[165]

Precisely what is procedural to the Supreme Court in a death penalty case is an interesting question. In Beck v. Alabama,[166] the Supreme Court reviewed Alabama's felony murder rule which prohibited the judge from instructing the jury on lesser included offenses in a capital case.[167] The jury had two choices only: either acquit the accused of the capital offense or convict and impose the death penalty; it was essentially an all-or-nothing judgment, with findings on lesser

included offenses not an option. The trial judge would then consider aggravating and mitigating factors and could refuse to impose the death sentence and instead sentence to life imprisonment.[168] The Supreme Court found this system constitutionally inadequate but, interestingly, regarded even a limitation on permissible findings to be procedural:

> To insure that the death penalty is indeed imposed on the basis of reason rather than emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.[169]

In Dobbert v. Florida,[170] the petitioner mounted an attack on his sentence to death on the grounds that, among other things, the changes to the state capital punishment scheme violated the constitutional prohibition against ex post facto laws. Dobbert committed the first-degree murder of his nine-year-old daughter in late 1971 and the second-degree murder of his seven year old son in early 1972.[171] After a sentencing hearing before judge and jury in accordance with the then-current Florida death penalty statute, the jury weighed aggravating and mitigating circumstances and the majority recommended life imprisonment.[172] The trial judge overruled the jury's recommendation and ordered the death sentence.[173]

From Dobbert's point of view, a critical issue was the change in functions of judge and jury between the time when he committed the murder and when he was tried. In July of 1972, the Florida Supreme Court

found its death penalty statute inconsistent with Furman and, in late 1972, Florida enacted the new death penalty statute found constitutional in Proffitt.[174] Under the new death penalty statute in effect at the time of his trial, the jury rendered an advisory verdict after hearing evidence on aggravating and mitigating circumstances, with the judge making the final sentencing decision.[175] Under the capital sentencing scheme in effect at the time of the murder, the death penalty was presumed unless the jury recommended mercy; however, a jury recommendation of life imprisonment was not subject to review by the trial judge.[176]

Reviewing Dobbert's assertions, the Supreme Court "conclude[d] that the changes in the law are procedural, and on the whole ameliorative, and there is no ex post facto violation."[177] The prohibition against ex post facto laws does not apply to procedural changes and, in Dobbert's case, "the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."[178]

In applying Dobbert to ex post facto challenges to new sentencing rules in capital cases, the courts have split. Some find new rules substantive and prejudicial; others find their sentencing changes to be procedural. The result in any given case appears to be somewhat arbitrary.

An interesting ex post facto case involving a change in aggravating circumstances is State v.

Correll.[179] Correll was involved in multiple murders, and, at his capital sentencing hearing, the government, in addition to aggravating factors in the code at the time of his crimes, used an additional aggravating circumstance that was added to the statutory scheme after his crimes: that he was convicted of one or more other homicides in connection with the offense on which he was being sentenced. The Arizona court concluded, albeit with virtually no discussion, that the new aggravating circumstance was a substantive rather than procedural change.[180]

The Louisiana Supreme Court came to a similar conclusion in State v. Jordan.[181] Jordan was convicted of first degree murder and the jury recommended the death sentence when it found as an aggravating circumstance that he committed the murder while engaged in the perpetration or attempted perpetration of armed robbery or aggravated burglary.[182] On appeal, his conviction was affirmed but his sentence set aside and remanded for a new sentencing hearing.[183] At his new sentencing hearing, Jordan sought by motion in limine to prevent the state from using in sentencing his prior record of criminal convictions, an aggravating circumstance added by the legislature after the date of the murder.[184] The supreme court determined that the code amendment, which provided the additional aggravating factor, was "a substantive change in the law" and ruled that "[t]o apply this enhancing amendment to the aggravating circumstances to the sentencing procedure of this defendant for this crime is an ex post facto ap-

plication of the law."[185]

Other courts, however, have made a determination, often based on Dobbert, that changes in state sentencing provisions do not constitute ex post facto violations, on the ground that the changes are procedural, not substantive.

A case in point is Jackson v. State,[186] in which the state supreme court reviewed the Mississippi mandatory death penalty scheme. The court determined that the legislature had intended to enact a death penalty statute that would meet constitutional requirements. However, the decisions in Gregg and other cases subsequent to the legislation's passage made it clear that the mandatory death penalty provisions were unconstitutional. Reading the statute's mandatory capital punishment language as permissive, the court, "[i]n the exercise of [its] inherent power to prescribe rules of procedure. . .," established a bifurcated sentencing proceeding and delineated the rules for admissibility of aggravating and mitigating evidence.[187] Presiding Judge Inzer in dissent agreed that the court had the inherent power to prescribe rules of procedure but disagreed that the court could "invade the legislative field and amend a statute under the guise of construing it, or prescribing Court procedure."[188]

In Bell v. State,[189] the accused shot to death a convenience store manager in May, 1976. He was convicted of capital murder in a bifurcated trial which followed the sentencing procedures established by Jackson, and his challenge to the application of Jack-

son to him was given short shrift by the Mississippi Supreme Court.[190] First, the law prior to Jackson mandated the death penalty and thus he benefited by the new rules.[191] "Moreover, the requirements of Jackson affect procedure and not substance and on the whole are ameliorative. In such case, the appellant is not subjected to an ex post facto violation."[192]

The Fifth Circuit in Jordan v. Watkins[193] dealt with a challenge by an accused sentenced to death under the Jackson procedures. Jordan argued that the Jackson changes constituted an ex post facto violation as substantive changes which worked to his detriment. The circuit court recognized that the Mississippi Supreme Court "exercised its 'inherent power' to promulgate rules to prescribe what it considered to be the necessary procedures and guidelines for imposing the death sentence."[194] Reasoning that Jordan's ex post facto argument was "indistinguishable" from the petitioner's argument in Dobbert, the circuit court rejected Jordan's challenge and determined that the Jackson changes were procedural in nature.[195]

Subsequent to Jackson, Mississippi enacted a statute that set forth different procedures as well as aggravating and mitigating circumstances. The state supreme court rejected a challenge to those provisions, again noting that the amendments "did not affect the substance of capital law but merely made changes in the procedures by which such cases were to be tried."[196] The court, in rejecting the ex post facto argument, applied the Dobbert "[f]inding that the statutory chan-

ges made between the time of the crime and the time of the trial were 'procedural, and on the whole ameliorative'. . . .'"[197]

The Montana Supreme Court addressed a similar issue in State v. Coleman.[198] Coleman was convicted of deliberate homicide, aggravated kidnapping, and sexual intercourse without consent, and he was sentenced to death.[199] On appeal, the state supreme court found the death penalty unconstitutionally imposed since it was pursuant to a mandatory capital punishment scheme. Coleman's sentence was set aside on appeal and his case remanded for a new sentencing hearing.[200] The trial court applied new sentencing statutes enacted in the interlude between the commission of the capital offense and the resentencing.[201] The new statute provided a scheme for imposing the death penalty: separate sentencing hearing, consideration of aggravating and mitigating circumstances, written findings and conclusions, and expedited review.[202] The court noted that the crime of aggravated kidnapping had always been punishable by death or imprisonment and that the new rules "related only to the procedure the court must follow in imposing the sentence."[203] Further, since the law in effect at the time of the crime mandated death while the new statute allowed a discretionary sentence, the new sentencing scheme was less onerous and hence not ex post facto.[204]

> The changes made by the 1977 enactments affected only the manner in which the penalty indicated by statute was to be determined and imposed. They did not deprive Coleman of any defense previously available nor affect the

> criminal quality of the act charged. Nor did they change the legal definition of the offense or the punishment to be meted out. They did not make an act criminal which was innocent when done; they did not increase the penalty for the crime. The quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remained the same. No substantial right or immunity possessed by Coleman at the time of the commission of the offense was taken away by the 1977 enactments.[205]

Reconciling the approaches taken by these various courts is difficult, if not impossible. However, there is one apparent but unarticulated distinction that applies to most, if not all of the cases. Where the aggravating circumstances were first established in a capital sentencing scheme that had no provision for aggravating factors, the new sentencing scheme was found procedural. Where, on the other hand, new aggravating factors were added to an already existing scheme of aggravating circumstances, they were found to be substantive. While such a distinction does not make much legal sense (a procedure should, after all, be a procedure whenever it is established), it does answer the instinctive reaction to an ex post facto challenge to a new aggravating circumstance. If the aggravating circumstance did not exist at the time of the offense and other aggravating circumstances did exist, there is a sense that the accused was not on notice that his offense warranted the death penalty. In comparison, if the statute at the time of the offense declared all such offenses capital, without reference to any

aggravating factor, then the accused is on notice that the offense might warrant the death penalty.

> It may be said, generally speaking, that an ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; but the prescription of different modes of procedure. . . , leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, [is] not considered within the constitutional limitation.[206]

The issue then is whether and how this distinction applies to R.C.M. 1004.

E. Rule for Courts-Martial 1004

The challenge to R.C.M. 1004 is directed principally to section (c) which delineates the aggravating factors, at least one of which must be found before death may be adjudged. The argument is most cogent if viewed in layman's terms: when Matthews declared the military sentencing procedures deficient, the court "threw out" the military death penalty; thus, when the President issued R.C.M. 1004, he "reinstated" the death penalty. Under this analysis, it logically flows that the President had in fact altered the quantum of punishment by authorizing the death penalty where it could not previously be adjudged. The President has,

in effect, created capital and non-capital cases, a substantive task he cannot assume.

While this argument has appeal, it is premised on error. The death penalty was never "thrown out." The court in Matthews found the court-martial sentencing procedures to be deficient. Rule for Courts-Martial 1004 does not change the punishment for the crime; the punishment is set forth in the Code. What R.C.M. 1004 establishes is the method which must be followed before court members can sentence to death. Applying the analysis developed above, since there were no aggravating factors delineated for capital offenses prior to R.C.M. 1004, the Rule is procedural. However, now that R.C.M. 1004 has established aggravating factors, any addition to the list might, under the Louisiana[207] and Arizona[208] approaches, be substantive. Until that challenge is mounted, however, there is solid ground for the position that what has been established in R.C.M. 1004 is purely procedural, a method for determining sentences in capital cases, and not a substantive change to the quantum of punishment.

V. THE PRESIDENT AS COMMANDER-IN-CHIEF

A. Introduction

The final basis asserted for the Presidential promulgation of R.C.M. 1004 is the power he holds under the Constitution as Commander-in-Chief of the armed

forces. The question is, however, just how far that power extends, particularly in a peacetime environment.

The Constitution provides that Congress has the ultimate authority to "make Rules for the Government and Regulation of the land and naval Forces."[209] Nevertheless, the President as Commander-in-Chief has the power to establish rules and regulations for the armed forces.[210] With respect to the administration of the nation's military forces, his power to establish rules and regulations is "undoubted."[211] He has the independent power "to deploy troops and assign duties as he deems necessary."[212] He can also control the quality of that force: the commissioning of officers, for example, "is a matter of discretion within the province of the President as Commander in Chief."[213] Just how far his power extends to control the armed forces in order to conduct or initiate an undeclared war is an open question,[214] but he clearly has abundant authority to conduct military operations. His power as Commander-in-Chief is "vastly greater than that of troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered territory and to punish those enemies who violated the law of war."[215]

B. Historical Background

Prior to the adoption of the Constitution, Congress exercised all governmental powers, although General Washington "was vested with full power and autho-

rity to act as he should think fit for the good and welfare of the services, and enjoined to cause strict discipline and order to be observed in the army."[216] The Constitution transferred to the President the executive power as well as the function of Commander-in-Chief, a function left undefined.[217]

> To [the function of commander-in-chief] therefore were properly to be regarded as attached, (with such modifications as the new form of the government required,) the powers originally vested in Congress and delegated by it . . . to the commander-in-chief of its army, and which had been exercised by the latter up to this period. Among these powers was the authority, properly incident to chief command, of issuing to subordinates and the army at large such orders as a due consideration for military discipline might require, and, among these, orders directing officers to assemble and investigate cases of misconduct and recommend punishment therefor--in other words orders constituting courts-martial.[218]

In discussing the function of the Commander-in-Chief, Hamilton compared it to the role of the British monarch:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the <u>declaring</u> of war and to the <u>raising</u> and <u>regulating</u> of fleets and armies,--all which, by the Constitution under consideration, would appertain to the legislature.[219]

The designation of the President as Commander-in-Chief was to assure that "the direction of war" would be conducted "by a single hand."[220] Thus, the Founding Fathers did not intend to give the Commander-in-Chief a blank check. Their intent, consistent with the concept of separation of powers, was to split authority over the armed forces. The President, as Commander-in-Chief, was tasked with operational control while Congress had the broader authority over and responsibility for the nation's military force.

The extent of the President's operational control has not gone unchallenged. Typically cases dealing with the President's powers as Commander-in-Chief involve actions taken during hostilities, or, subsequent to hostilities, during occupation of enemy territory.[221] The outer limits of his authority were arguably tested in Fleming v. Page,[222] which turned on his power to extend national boundaries through conquest. The issue was whether goods shipped from the port of Tampico, Mexico, which had been taken and held by U.S. forces, should have duties levied on them as goods shipped from a foreign port. The Court, in reaching its decision, looked at the impact of the military operations: the port was in the possession of the United States and governed by military authorities, acting under the orders of the President.[223] Nevertheless, the extension of U.S. boundaries could only be accomplished by treaty or by legislation.

> [It] is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to

> direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.[224]

The Commander-in-Chief is empowered not only to fight foreign wars, but also to suppress internal insurrection. In the Prize Cases,[225] owners of ships seized as violators of President Lincoln's blockade of southern ports challenged the blockade, which had been ordered prior to any legislative recognition of a war. The Court rejected the challenge, noting the President's duty as Commander-in-Chief:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is not the less a war. . . .
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> . . . .
>
> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided <u>by him</u>, and this Court must be governed by the decisions and acts of the political department of the

> Government to which this power was entrusted. He must determine what degree of force the crisis demands.[226]

As to occupied territory, he is authorized "to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered territory . . . ."[227] As the Supreme Court noted in Madsen v. Kinsella,[228] as Commander-in-Chief, the President in time of war may prescribe the jurisdiction and procedure for military commissions and like tribunals in occupied territory, a power that sometimes "survives cessation of hostilities. The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms."[229]

Further, with respect to captured territory, even when that territory is not "foreign," the Commander-in-Chief has the power to establish provisional courts. Thus, in The Grapeshot,[230] the Supreme Court found constitutionally proper the establishment of provisional courts in Louisiana during the Civil War. The duty of the national government in occupying formerly Confederate territory was to provide for the remainder of the war for the security of individuals and property, and for the administration of justice, a duty typical of one belligerent occupying the territory of another: "It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held."[231] The power to create courts in

occupied territory includes courts of both civil and criminal jurisdiction.[232]

Once the territory ceases to be hostile foreign territory, however, the President no longer holds unlimited power as Commander-in-Chief. For example, during the war with Spain, he had full authority over Puerto Rico, until the island was ceded to the United States by treaty.[233] Once Puerto Rico ceased to be hostile foreign territory, while the right to administer it continued until Congressional action, that administrative authority was no longer absolute.[234]

Thus, both as to foreign war and internal insurrection, the President has all those powers consistent with the need of the military force to assure that territory held by it will be secured. The President can conduct operations, conquer territory, and administer it until Congress takes further action. He cannot, however, by conquest expand the national boundaries. In sum, while the President has extensive authority in conducting operations while wearing his "military hat," his actions as Commander-in-Chief may not extend beyond the military sphere and into the political arena, except as necessary to maintain the status quo until Congress takes action. So long as his actions are incident to his function as military leader, a broadly interpreted concept, his actions are proper.

Recently the Supreme Court has indicated another area in which the President as Commander-in-Chief has the power to act: the protection of national security

information.

> The President, after all, is the "Commander in Chief of the Army and Navy of the United States." His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.[235]

This power, too, is consistent with the notion that the President is uniquely qualified and responsible for the military's operational control. Conceptually, there are significant similarities between assuring that information critical to national security is safeguarded and assuring that captured territory is secured: both are essential to effective military operations.

To summarize, the powers of the Commander-in-Chief generally flow, as they logically should, from the role envisioned for him by the Founding Fathers as "the single hand" tasked with "the direction of war" in all its various facets.

Even where the need to respond to a military crisis arises, however, the President's power as Commander-in-Chief is not unlimited. During the Korean war, fearing that an imminent nation-wide strike of steel workers would threaten the national defense, President Truman ordered the seizure of most of the nation's steel mills, an act subsequently found to be beyond the President's constitutional power.[236] The

Supreme Court in Youngstown Sheet and Tube Co. v. Sawyer summarily rejected the government argument that the President as Commander-in-Chief properly exercised his military power in seizing the mills in light of the "broad powers in military commanders engaged in day-to-day fighting in a theater of war."[237] "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."[238]

Justice Jackson, in his concurring opinion, expounded on the powers of the President as "Commander in Chief of the Army and Navy of the United States":

> These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation's armed forces under presidential command.
>
> . . . .
>
> He has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions.

. . . .

> While broad claims under this rubric often have been made, advice to the President in specific matters usually has carried overtones that powers, even under this head, are measured by the command functions usual to the topmost officer of the army and navy. Even then, heed has been taken of any effort of Congress to negative his authority. . . .
>
> His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress.[239]

In sum, the function of Commander-in-Chief is precisely that which the title indicates: he is the "first General" of the nation's military forces, tasked with its operational control. That function grants much, although not undisputed or undivided, control over the armed forces, with the thrust of precedent indicating that its broadest reach is in the conduct of operations during time of war and in the control of conquered territory. The question now is how far that operational control extends over courts-martial.

C. Application to Courts-Martial

The difficulty in determining the scope of the Commander-in-Chief's powers, particularly with respect to courts-martial, lies in applying different and potentially inconsistent parts of the Constitution. As has been seen, the President is empowered to act as Commander-in-Chief of the nation's military forces.

Yet, Congress has been granted the power to make rules and regulations for the armed forces. The question is where is the line drawn between those two grants of authority.

In United States v. Smith,[240] the Court of Military Appeals analyzed the distinction between the powers over the armed forces belonging to Congress and those belonging to the President as Commander-in-Chief. The court reviewed the history of the Constitution and concluded that the Founding Fathers were convinced that the Executive, unlike the British monarch, should not have the sole power of raising and regulating the nation's armed forces:

> [I]n the military field, the powers attributed to the King by Blackstone were distributed to the President and to the Congress. The President succeeded the King, who commanded fleets and armies, and was made Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States. But the King's power to raise armies, provide a navy and to make rules for the government and regulation of the land and naval forces, was transferred from the Executive to the Legislative branch of government.
>
> The language of the Constitution makes the President Commander-in-Chief of the Armed Forces and puts no limitation on his power in this capacity. Indeed, the paucity of the words exemplifies the totality of his authority in that respect. The identical situation exists in the provision granting the power to Congress "To make Rules for the Government and Regulation of the land and naval Forces." There is no limitation in the

constitutional language giving this power to Congress.[241]

In Reid v. Covert,[242] the Supreme Court noted that the power of the Commander-in-Chief over courts-martial was by no means a closed question: "it has not yet been definitely established to what extent the President, as commander-in-chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war."[243] Military courts have taken the position that, in general, the President cannot promulgate or change substantive military law: "[t]he President's power as Commander-in-Chief does not embody legislative authority to provide crimes and offenses."[244] He may only prescribe rules of evidence and procedure and establish maximum punishments.[245] That he can prescribe substantive rules in light of the Constitutional iteration that Congress has the authority to make the rules for the government and regulation of the armed forces is "questionable."[246] The designation as Commander-in-Chief is "consistent with his role as the chief executive officer of the Government, rather than an attempt to confer legislative authority on him."[247] Thus, for example, he can not provide the standard for mental responsibility which is a matter of "substantive law."[248] Where, however, Congress has defined offenses and provided for prosecution by courts-martial but has failed to specify all the necessary procedures, the President must formulate those procedural rules.[249]

While the President carries much power as Commander-in-Chief over the forces under his command, the military justice system is not a creature of his making:

> The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or navy service.[250]

That the court-martial system falls within the Congressional realm of authority is confirmed by the fact that the President establishes court-martial procedures pursuant to authority delegated to him by Congress in Article 36, UCMJ.

Are the two lines of authority consistent: the one line based on Congress' power to make rules and regulations for the armed forces, the other line based on the Commander-in-Chief's "undoubted" power to establish rules and regulations for the administration of the nation's military? Analytically, it appears that the two can be reconciled, perhaps more on common sense grounds than on any pure legal theory.

The President has supreme command over the forces and can establish necessary rules and regulations of an administrative nature to protect his command. Congress, on the other hand, has broad power over the military forces, which includes of course its legislative functions. The delineation of substantive criminal offenses is within the ambit of Congress. Between

the two distinct areas--administrative measures incident to supreme command, and substantive law--lies the disputed territory of criminal rule-making. Although there is support for independent Presidential authority in this area,[251] it appears to be more a legislative function. While Congress has chosen to delegate some of its rule-making authority in the criminal area to the President, it has retained its substantive authority over the nation's military forces. Certainly some of the rules established pursuant to this delegation may impact in a substantial way on the military justice system, for example, rules relating to admissibility of evidence. Nonetheless, they are procedural and not substantive.

D. Conclusion

Interestingly, the Court of Military Appeals in Matthews applied civilian precedent to the military's death penalty scheme since there was no "military necessity" for distinguishing court-martial capital sentencing procedures from their civilian counterparts.[252] It would be ironic to see a constitutionally mandated civilian sentencing scheme engrafted on the military justice system through the operation of the President's military powers. Logic and precedent dictate that this should not be the result: should R.C.M. 1004 fail under the President's powers under Article 36 or Article 56, it should not be rescued by his powers as Commander-in-Chief. As Commander-in-Chief of the

nation's military forces, he is empowered by the Constitution to conduct military operations and organize and direct the force as he deems militarily necessary. To adopt Justice Jackson's analysis in Youngstown, he has the power incident to command. He does not have the power to establish substantive law for the military justice system or provide for capital punishment where the legislature has chosen not to do so.

VI. SUMMARY

The President had the power under Articles 36 and 56 of the UCMJ to promulgate R.C.M. 1004: he has been properly delegated abundant authority to act in the areas of maximum punishments and court-martial procedures, particularly in view of the extensive history of Presidential action in these areas. In Youngstown, Justice Jackson articulated three groupings of situations in which a President may attempt to exercise power. "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . ."[253] In promulgating R.C.M. 1004 based on Articles 36 and 56, the President has just such broad authority. However, promulgation grounded in his role as Commander-in-Chief would not rest on such extensive authority.

Justice Jackson continued, explaining the two other types of situations:

> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.[254]

Since Congress has not displayed "inertia, indifference or quiescence" in establishing substantive law and capital offenses for the military, it seems clear that, absent the delegations of Articles 36 and 56, the President's power to act independently in these areas would be "at its lowest ebb." Yet his authority as Commander-in-Chief is essentially a function of command; it does not empower him to sit as some sort of super-legislature for the military. Only Congress is constitutionally authorized to act to provide substantive law for the nation's armed forces. Hence, were it not for Articles 36 and 56, the President could not properly promulgate R.C.M. 1004 based solely on his power as Commander-in-Chief.

1. 16 M.J. 354 (C.M.A. 1983).

2. Id. at 380 (citing Article 36, Uniform Code of Military Justice, 10 U.S.C. 836 [hereinafter UCMJ or Code]).

3. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1004 [hereinafter MCM, 1984 or Manual, and R.C.M. or Rule, respectively] currently provides:

(a) In general. Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and

(3) The requirement of subsections (b) and (c) of this rule have been met.

(b) Procedure. In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases---

(1) Notice. Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) Evidence of aggravating factors. Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to

establish one or more of the aggravating factors in subsection (c) of this rule.

(3) Evidence in extenuation and mitigation. The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(4) Necessary findings. Death may not be adjudged unless---

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) Basis for findings. The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) Instructions. In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) Voting. In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this

rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) Announcement. If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) Aggravating factors. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118 or 120;

(2) That in committing the offense the accused---

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered,

except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the

United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of Title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid. 315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpertrator [sic] of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

....

(d) Spying. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) Other penalties. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.

4. Article 56, on maximum limits, provides that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."

5. Article 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

6. Article II provides in part that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual Service of the United States...." U.S. Const. art. II, section 2.

7. 408 U.S. 238 (1972).

8. The per curiam opinion of the court consisted of one paragraph which held, without explanation, that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Furman, 408 U.S. at 239-240. Each of the five justices making up the majority wrote a separate opinion.

9. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

10. Id., 428 U.S. at 189.

11. Id., 428 U.S. at 195.

12. 428 U.S. 153.

13. 428 U.S. 242 (1976).

14. 428 U.S. 262 (1976).

15. Gregg, 428 U.S. at 190.

16. Id., 428 U.S. at 204. See also Jurek, 428 U.S. at 276 ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.").

17. Gregg, 428 U.S. at 162-168.

18. Proffitt, 428 U.S. at 248-249.

19. Id., 428 U.S. at 249 (quoting Tedder v. Florida, 322 So.2d 908, 910 (Fla. 1975)).

20. The five categories were: murder of a peace officer or fireman; murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim was a prison employee. Jurek, 428 U.S. at 268.

21. The questions were: whether the conduct of the defendant that caused the death was committed deliberately and with the reasonable expectation that death would result; whether there is a probability that the defendant would commit criminal acts of

violence that would constitute a threat to society; and whether the defendant's conduct in killing the victim was unreasonable in light of the provocation, if any, by the victim. Jurek, 428 U.S. at 269.

22. Id.

23. Id., 428 U.S. at 270.

24. Id., 428 U.S. at 271.

25. Id., 428 U.S. at 273-274.

26. Id., 428 U.S. at 274.

27. 428 U.S. 280 (1976).

28. 428 U.S. 325 (1976).

29. 436 U.S. 586 (1978).

30. Id., 438 U.S. at 604 (Burger, C.J.)(plurality opinion)(footnotes omitted)(emphasis in original).

31. Matthews, 16 M.J. at 359, 361, 363.

32. Id., 16 M.J. at 361.

33. Id., 16 M.J. at 364.

34. Id., 16 M.J. at 368-369.

35. Matthews, 16 M.J. at 377.

36. Id., 16 M.J. at 377.

37. Id., 16 M.J. at 378 (citations omitted).

38. Id.

39. Id.

40. Id., 16 M.J at 379.

41. Id., 16 M.J. at 378.

42. Id.

43. Id., 16 M.J. at 380-381 (footnote omitted).

44. Indeed, the Matthews court specifically noted the proposed rule. See id., 16 M.J. at 380.

45. Executive Order 12473, 3 C.F.R. 201 (1984), as amended by Executive Order 12484, 3 C.F.R. 217 (1984).

46. Although one commentator feels that the President's power to set maximum punishments is not "pertinent" to the issue of the propriety of the military's system for assessing the death sentence, see W. Wilson, Defense Tactics Under the New Death Penalty Sentencing Procedure, 15 The Advocate 300, at 303 (Nov.-Dec. 1983), nevertheless, defendants are making the argument that R.C.M. 1004 is an unconstitutional intrusion into the exclusive legislative province of Congress in the sentencing arena on separation of power grounds. See Appellant's Assignment of Errors at Section VII, United States v. Dock, 26 M.J. 620 (CM 446898), cert. for review filed, 26 M.J. 301 (C.M.A. 1988). Further the issue has been of concern to military appellate judges. See United States v. Matthews, 16 M.J. at 392 (Fletcher,

J., concurring in the result); United States v. Matthews, 13 M.J. 501, 550 (A.C.M.R. 1982)(en banc)(O'Donnell, J., concurring in part and dissenting in part).

47. See UCMJ art. 85(c), 90, 94, 99, 100, 101, 102, 104, 106, 106a, 110, 113, 118, and 120.

48. See Government Answer to Assignment of Errors, at 88-90, United States v. Dock, 26 M.J. 620.

49. U.S. Const. art. I, section 1; art. II, section 1, cl. 1; art. III, section 1.

50. The Federalist No. 48, at 343 (J. Madison)(B. Wright ed. 1961).

51. I.N.S. v. Chadha, 462 U.S. 919, 951 (1983). See generally The Federalist No. 47 (J. Madison).

52. Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

53. 11 U.S. (7 Cranch) 382 (1813).

54. Field v. Clark, 143 U.S. 649, 683 (1892).

55. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

56. The National Industrial Recovery Act of June 16, 1933, 40 U.S.C. Sections 402-411a (repealed 1966).

57. 293 U.S. 388 (1935).

58. Id., 293 U.S. at 414.

59. Id., 293 U.S. at 415.

60. Id.

61. Id.

62. Id., 293 U.S. at 416-420.

63. Id., 293 U.S. at 417, 418-419.

64. Id., 293 U.S. at 428-429.

65. Id., 293 U.S. at 430.

66. 295 U.S. 495 (1935).

67. Id., 295 U.S. at 523-526.

68. Id., 295 U.S. at 535.

69. Id., 295 U.S. at 537, 538.

70. Id., 295 U.S. at 538-541, 542.

71. 321 U.S. 414 (1944).

72. The Emergency Price Control Act of January 30, 1942, 50 U.S.C. App. Sections 901-924, as amended by the Inflation Control Act of October 2, 1942, 50 U.S.C. App. Sections 961-971 (1951).

73. Yakus, 321 U.S. at 419-420.

74. Id., 321 U.S. at 423.

75. Id., 321 U.S. at 423.

76. Id.

77. United States v. Richardson, 685 F.Supp. 111, 113 (E.D.N.C. 1988).

78. Mistretta v. United States, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989).

79. Sentencing Reform Act of 1984, 28 U.S.C. Sections 991-998 (1987).

80. 28 U.S.C. Section 991(a).

81. 28 U.S.C. Section 994.

82. For example, an issue of much concern to the courts was whether locating the Commission in the judicial branch violated separation of powers concerns in that the Commission was performing executive functions. See, e.g., United States v. Frank, 682 F.Supp. 815 (W.D. Pa. 1988); United States v. Ruiz-Villanueva, 680 F.Supp. 1411 (S.D.Cal. 1988); United States v. Chambless, 680 F.Supp. 793 (E.D. La. 1988); United States v. Arnold, 678 F.Supp 1463 (S.D. Cal. 1988).

83. Whalen v. United States, 445 U.S. 684, 689 (1980).

84. United States v. Tolbert, 682 F.Supp. 1517, 1522 (D.Kan. 1988).

85. Id.

86. See id., 682 F.Supp. at 1522-23; United States v. Richardson, 685 F.Supp. 111. See also United States v. Diaz, 685 F.Supp. 1213, 1215 n.1 (S.D. Ala. 1988) and cases cited therein.

87. United States v. Frank, 682 F.Supp. at 820 (citations omitted). Accord United States v. Tolbert, 682 F.Supp at 1522.

88. Mistretta v. United States, 57 U.S.L.W. 4102.

89. Id., 57 U.S.L.W. at 4105 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. at 394).

90. Id.

91. See supra notes 57 and 66 and accompanying text.

92. Mistretta, 57 U.S.L.W. at 4105.

93. Id. (quoting American Power and Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

94. Id.

95. W. Winthrop, Military Law and Precedents 395 (2d ed. 1920 reprint).

96. Id.

97. Id., Appendix XII, at 994, Art. 96, The American Articles of War of 1874.

98. Id., at 417.

99. Uniform Code of Military Justice; Hearings on H.R. 2498 before a Subcomm. of the House Armed Services Committee, 81st Cong., 1st Sess. 565 (1949), reprinted in Index and Legislative History, Uniform Code of Military Justice, at 1087-1089 (1950)[hereinafter Hearings].

100. Id., at 1088 (Statement of Mr. Larkin).

101. H. Rep. No. 49, 81st Cong., 1st Sess. 1, 16 (1949).

102. Article 18, UCMJ, provides for the jurisdiction of general courts-martial:

[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. . . .

103. Hearings, supra note 99, at 959-960 (Statement of Mr. Larkin).

104. Art. 55, UCMJ.

105. Id.

106. Hearings, supra note 99, at 1088-1089 (Statement of Mr. Larkin).

107. Lichter v. United States, 334 U.S. 742, 785 (1948)(quoting American Power and Light Co. v. S.E.C., 329 U.S. at 104).

108. Gregg v. Georgia, 428 U.S. at 175-176.

109. 729 F.2d 1216 (9th Cir. 1984).

110. 18 U.S.C. Sections 791-799 (1982).

111. Harper, 729 F.2d. at 1217-1218.

112. Id., 729 F.2d at 1218.

113. Id., 729 F.2d at 1218-1219, 1224-1225.

114. Id., 729 F.2d at 1224.

115. Id., 729 F.2d at 1225.

116. Id.

117. Id. (quoting Gregg, 428 U.S. at 175).

118. Harper, 729 F.2d at 1225.

119. 672 P.2d 862 (Cal. 1983)(en banc).

120. In fact, the provision in question resulted from a popular death penalty initiative and the court looked, not just at the wording of the initiative, but also to the ballot arguments, the purpose of the initiative as explained to the voters.

121. 801 F.2d 1519 (9th Cir. 1986).

122. Id., 801 F.2d at 1529.

123. Id., 801 F.2d at 1529-1530.

124. 654 P.2d 1170 (Wash. 1982)(en banc), vacated and remanded on other grounds, 463 U.S. 1203 (1983)(for reconsideration in light of Zant v. Stephens, 462 U.S. 862 (1983)), on remand, 683 P.2d 1079 (Wash. 1984)(en banc).

125. Bartholomew, 654 P.2d at 1180.

126. 428 U.S. at 272.

127. Thus, in the debate over the enactment of the capital offense of peacetime espionage (UCMJ art. 106a), a major concern was that the enactment of specific statutory sentencing standards for the espionage offense could be construed as a comment on the Manual's capital sentencing provisions. In fact, the conference committee report explicitly denied any such construction: the proposed espionage legislation "was not intended to affect the validity of existing death penalty provisions in the UCMJ or the capital sentencing procedures promulgated by the President in the Manual for Courts-Martial, 1984. . . . The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles." 131 Cong. Rec. H6490, H6637-6638 (daily ed. July 29, 1985)(conference committee report on S. 1160, Department of Defense Authorization Act of 1986).

128. Morrison v. Olson, 108 S.Ct. 2597, 2620 (1988)(quotations omitted)(citations omitted).

129. See UCMJ art. 106.

130. See Lockett v. Ohio, supra note 29 and accompanying text. Simply stated, a mandatory capital sentence precludes the constitutionally required individualized determination of the appropriateness of the death penalty. Sumner v. Schuman, 107 S.Ct. 2716 (1987)(statute mandating the death penalty for murder committed by a prison inmate serving a life sentence without possibility of parole held unconstitutional).

131. In the discussion over the legislation proposing UCMJ art. 106a for peacetime espionage, Senator McCollum indicated his hope that the Manual's capital sentencing procedures would be found constitutional, 131 Cong. Rec. H5448 (daily ed. July 11, 1985)(statement of Sen. McCollum), while Senator Levin advocated not jeopardizing judicial review of the Manual procedures by enacting specific procedures for espionage which might "prejudice the Government's position that the executive branch, rather than the Congress, should establish procedures for capital offenses under the military code," 131 Cong. Rec. S10350 (daily ed. July 30, 1985)(statement of Sen. Levin).

132. Yakus, 321 U.S. at 424-425.

133. Bowsher v. Synar, 106 S.Ct. 3181, 3192 (1986).

134. Sibbach v. Wilson, 312 U.S. 1, 9 (1941).

135. See generally E. Fidell, Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs, 4 Mil. L. Rev. 6049 (Oct.-Dec. 1976).

136. Hearings, supra note 99, at 1014-1015.

137. Id. at 1017.

138. Miller v. Florida, 107 S.Ct. 2446, 2453 (1987).

139. Sibbach, 312 U.S. at 14.

140. Wilson, supra note 46, at 304-307. See also Appellant's Assignment of Errors at Section I, United States v. Murphy, ACMR 8702873 (A.C.M.R. filed Nov. 15, 1988).

141. United States v. Sherwood, 312 U.S. 584, 590 (1941).

142. Wilson, supra note 46, at 307 (quoting McCollum Aviation, Inc. v. CIM Associates, Inc., 438 F.Supp. 245, 248 (S.D. Fla. 1977)).

143. See U.S. Const. art. I, section 10.

144. Beazell v. Ohio, 269 U.S. 167, 169-170 (1925).

145. See, e.g., Thompson v. Utah, 170 U.S. 343 (1898); Hopt v. Utah, 110 U.S. 574 (1884).

146. 107 S.Ct. 2446 (1987).

147. Id., 107 S.Ct. at 2448.

148. Id.

149. Id., 107 S.Ct. at 2448-2450.

150. Id., 107 S.Ct. at 2450.

151. Id., 107 S.Ct. at 2452-53 (quoting Hopt v. Utah, 110 U.S. at 590.

152. Miller, 107 S.Ct. at 2453 (quotation omitted).

153. Id., 107 S.Ct. at 2453-2454. The Court determined that the revised sentencing guidelines were laws for ex post facto purposes, were not flexible guideposts but significant hurdles for an accused, and directly and adversely affected sentences.

154. 765 F.2d 849 (9th Cir. 1985).

155. Id., 765 F.2d at 850.

156. Id.

157. Thompson v. Blackburn, 776 F.2d 118, 121 (5th Cir. 1985).

158. 777 F.2d 1376 (9th Cir. 1985). The court did agree that the forfeiture provisions violated due process in that she was not granted a timely opportunity to contest her deprivation of property. That portion of the opinion has subsequently been limited to its facts. United States v. Draine, 637 F.Supp. 482, 485 (S.D. Ala. 1986).

159. Crozier, 777 F.2d at 1379, 1382.

160. Id., 777 F.2d at 1383.

161. Id.

162. Id.

163. See, e.g., Gregg, 428 U.S. at 188, 195, 196; Proffitt, 428 U.S. at 251-253, Roberts, 428 U.S. at 334; Lockett, 438 U.S. at 601, 605; Godfrey v. Georgia, 446 U.S. 420, 427 (1980); Zant v. Stephens, 462 U.S. 862, 884 (1983).

164. 463 U.S. 992 (1983).

165. Id., 463 U.S. at 999.

166. 447 U.S. 625 (1980).

167. Id., 447 U.S. at 628-629.

168. Id.

169. Id., 447 U.S. at 638 (quotation omitted)(footnote omitted).

170. 432 U.S. 282 (1977).

171. Id., 432 U.S. at 284, 288.

172. Id., 432 U.S. at 287.

173. Id.

174. Id., 432 U.S. at 288.

175. Id., 432 U.S. at 292-295.

176. Id., 432 U.S. at 292-295.

177. Id., 432 U.S. at 292 (footnote omitted).

178. Dobbert, 432 U.S. at 293-294.

179. 715 P.2d 721 (Ariz. 1986)(en banc).

180. Id.

181. 440 So.2d 716 (La. 1983).

182. Id., 440 So.2d 717.

183. Id., 440 So.2d at 717-718.

184. Id.

185. Id.

186. 337 So.2d 1242 (Miss. 1976).

187. Id., 337 So.2d at 1256. For a court that refuses to take the steps followed by the Jackson court, see People v. Smith, 468 N.E.2d 879, 898 (N.Y. 1984), cert. denied, 469 U.S. 1227 (1985), in which the New York court, after throwing out a mandatory death penalty scheme, refused the government's invitation to establish other sentencing procedures. The Jackson procedures were subsequently found, however, to fail to sufficiently channel the sentencer's discretion. Jordan v. Watkins, 681 F.2d 1067, 1082-1083 (5th Cir. 1982).

188. Jackson, 337 So.2d at 1260 (Inzer, P.J., dissenting).

189. 353 So.2d 1141 (Miss. 1978)

190. Id., 353 So.2d at 1142-1143.

191. Id., 353 So.2d at 1143.

192. Id.

193. 681 F.2d 1067. As noted above, supra note 187, the court did agree that the Jackson guidelines failed to sufficiently channel the sentencer's discretion.

194. Jordan, 681 F.2d at 1078.

195. Id.

196. Irving v. State, 441 So.2d 846, 852 (Miss. 1983), cert. denied, 470 U.S. 1059 (1985).

197. Id., 441 So.2d at 852 (quoting Dobbert, 432 U.S. at 292).

198. 605 P.2d 1000 (Mont. 1979), cert, denied, 446 U.S. 970 (1980).

199. Id., 605 P.2d at 1006.

200. Id., 605 P.2d at 1006, 1007.

201. Id., 605 P.2d 1007, 1010.

202. Id., 605 P.2d at 1012.

203. Id.

204. Id.

205. Id., 605 P.2d at 1015.

206. Duncan v. Missouri, 152 U.S. 377, 382 (1894).

207. Supra note 181.

208. Supra note 179.

209. U.S. Const. art. 1, section 8.

210. See Kurtz v. Moffitt, 115 U.S. 487, 503 (1885).

211. United States v. Eliason, 41 U.S. (16 Pet.) 291, 301-302 (1842).

212. United States v. Ezell, 6 M.J. 307, 317 (C.M.A. 1979).

213. Orloff v. Willoughby, 345 U.S. 83, 90 (1953).

214. For example, the Supreme Court refused to consider the President's authority as Commander-in-Chief to conduct the war in

Vietnam. See, e.g., DaCosta v. Laird, 405 U.S. 979 (1972); Massachusetts v. Laird, 400 U.S. 886 (1970). See also the War Powers Resolution, 50 U.S.C. Sections 1541-1548 (1976).

215. Hirota v. MacArthur, 338 U.S. 197, 208 (1948)(Douglas, J., concurring)(citing New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 394 (1874); Ex parte Quirin, 317 U.S. 1, 28-29 (1942); and In Re Yamashita, 327 U.S. 1, 10-11 (1946)).

216. Winthrop, supra note 95, at 59 (quotation omitted)..

217. Id.

218. Id. (emphasis omitted).

219. The Federalist No. 68, supra note 50, at 446 (A. Hamilton).

220. The Federal No. 74, supra note 50, at 473 (A. Hamilton).

221. See, e.g., Dooley v. United States, 182 U.S. 222 (1901); DeLima v. Bidwell, 182 U.S. 1 (1901).

222. 50 U.S. (9 How.) 603 (1850).

223. Id., 50 U.S. at 614.

224. Id., 50 U.S. at 615.

225. The Brig Amy Warwick; the Schooner Crenshaw; the Barque Hiawatha; the Schooner Brilliante, 67 U.S. (2 Black) 635 (1862).

226. Id., 67 U.S. at 668, 670 (emphasis in original)(quotation omitted).

227. Cross v. Harrison, 57 U.S. (1 How.) 164, 190 (1853)

228. 343 U.S. 341 (1952).

229. Id., 343 U.S. at 348 (footnotes omitted).

230. 76 U.S. (9 Wall.) 129 (1869).

231. Id., 76 U.S. at 132.

232. See Mechanics' and Traders' Bank v. Union Bank, 89 U.S. (22 Wall.) 276 (1874).

233. Dooley v. United States, 182 U.S. 222 (1901). See also DeLima v. Bidwell, 182 U.S. 1 (1901).

234. Dooley, 182 U.S. at 234-234. See Sanchez v. United States, 216 U.S. 167, 176 (1910).

235. Department of Navy v. Egan, 108 S.Ct. 818, 824 (1988) (citations omitted).

236. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

237. Id., 343 U.S. at 587.

238. Id.

239. Id., 343 U.S. at 641-646 (Jackson, J., concurring).

240. 32 C.M.R. 105 (C.M.A. 1962).

241. Id., 32 C.M.R. at 117.

242. 354 U.S. 1 (1957)

243. Id., 354 U.S. at 38 (footnote omitted).

244. United States v. McCormick, 30 C.M.R. 26, 28 (C.M.A. 1960).

245. Id.

246. United States v. Jones, 19 M.J. 961, 968 n. 12 (A.C.M.R. 1985), aff'd, 26 M.J. 353 (C.M.A. 1988). But see United States v. Lowery, 21 M.J. 998, 1000 (A.C.M.R. 1986) (President as Commander-in-Chief can establish armed forces' custom), aff'd, 24 M.J. 347 (C.M.A. 1987)(summary disposition).

247. United States v. Perry, 22 M.J. 669, 670 n. 2 (A.C.M.R. 1986).

248. United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

249. United States v. Newcomb, 5 M.J. 4, 7 (C.M.A. 1978)(Cook, J., concurring).

250. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1886).

251. See Swaim v. United States, 165 U.S. 553, 565 (1897). Other cases cited for independent Presidential rule making power are Ex parte Reed, 100 U.S. 13 (1879) and Smith v. Whitney, 116 U.S. 167 (1886), although, in fact, the authority exercised in those cases was based on statute.

252. Matthews, 16 M.J. at 369.

253. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. at 635 (Jackson, J., concurring)(footnote omitted).

254. Id., 343 U.S. at 637 (Jackson, J., concurring)(footnotes omitted).